

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

15 Taiwan Allen, a Nevada prisoner represented by counsel, filed a petition for writ of  
16 habeas corpus pursuant to 28 U.S.C. § 2254 (docket #1) raising three grounds for relief.  
17 Respondents move to dismiss the petition on the basis that it contains unexhausted claims for relief  
18 (docket #6). Petitioner has opposed the motion, filing the brief beyond the date on which it was due  
19 (docket #15). However, petitioner moved the court to accept the untimely filing (docket #14),  
20 showing excusable neglect. That motion shall be granted and the opposition shall be reviewed and  
21 considered by the court. Finally, respondents reply to the opposition (docket #16). Based upon the  
22 discussion below, the motion to dismiss shall be denied.

## 23 || I. Procedural Background

24 Petitioner was convicted after a jury trial of first degree murder with the use of a  
25 deadly weapon and was sentenced to two consecutive life terms without the possibility of parole. He  
26 filed a direct appeal, which was denied. He then filed a post-conviction petition and was appointed

1 counsel to assist him. An evidentiary hearing was conducted and the state district court denied relief.  
2 On appeal of this denial, petitioner raised five assertions of ineffective assistance of trial counsel.  
3 The Nevada Supreme Court affirmed the lower court's decision. On September 3, 2009, with the  
4 assistance of counsel petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §  
5 2254 in this action. Respondents have moved to dismiss the petition, contending that three subparts  
6 of ground one are unexhausted. Petitioner argues the motion is without merit as he has presented to  
7 this court the same claims he presented to the Nevada Supreme Court - ineffective assistance of  
8 counsel based on counsel's failure to "conduct an adequate pretrial investigation" and because he  
9 "made critical trial errors." Opposition to Motion to Dismiss (docket #15), pp. 3-4.

10 **II. Legal Standard**

11 A federal court will not grant a state prisoner's petition for habeas relief until the  
12 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.  
13 509 (1982); 28 U.S.C. § 2254(b).<sup>1</sup> State remedies have not been exhausted unless the claim has been  
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15 <sup>1</sup> 28 U.S.C. § 2254(b) states, in pertinent part:  
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17 An application for a writ of habeas corpus on behalf of a person in  
18 custody pursuant to the judgment of a State court shall not be granted  
19 unless it appears that: (A) the applicant has exhausted the remedies  
20 available in the courts of the State; or (B)(i) there is an absence of  
21 available state corrective process; or (ii) circumstances exist that render  
22 such process ineffective to protect the rights of the applicant.

23 \* \* \*

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25 (c) An applicant shall not be deemed to have exhausted the remedies  
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1 fairly presented to the state courts. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). To fairly  
 2 present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts  
 3 a claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999),  
 4 *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. The petitioner must make  
 5 the federal nature of the claim “explicit either by citing federal law or the decisions of the federal  
 6 courts.” *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*, 247 F.3d 904 (9th Cir.  
 7 2001).

8                   The mere similarity of claims of state and federal error is insufficient to establish  
 9 exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*, 232 F.3d at  
 10 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). “[G]eneral appeals to broad  
 11 constitutional principles, such as due process, equal protection, and the right to a fair trial, are  
 12 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S.  
 13 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987. However, while federal-state comity  
 14 concerns preclude this court’s consideration of “ ‘new evidence that places [a] claim in a  
 15 significantly different posture’ ” on habeas review, federal courts in this circuit have previously  
 16 considered additional evidence that does not alter the gravamen of the petitioner’s claim. *Luna v.*  
 17 *Cambra* 306 F.3d 954, 965 (C.A.9 (Cal.), 2002) as amended by 311 F.3d 928 (9<sup>th</sup> Cir. 2002) citing  
 18 *Brown v. Myers*, 137 F.3d 1154, 1157 n. 3 (9<sup>th</sup> Cir. 1998) (alteration in original) (quoting *Nevius v.*  
 19 *Sumner*, 852 F.2d 463, 470 (9th Cir. 1988)).

20 **III. Discussion**

21                   Respondents contend that petitioner has failed to exhaust parts of ground one of the  
 22 petition. They specifically assert that (1) petitioner did not “argue to the Nevada Supreme Court that

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23                   available in the courts of the State, within the meaning of this section, if  
 24 he has the right under the law of the State to raise, by any available  
 25 procedure, the question presented.

1 trial counsel was ineffective for presenting expert testimony regarding a two-gun battle;” (2) that  
2 although petitioner argued in state court that counsel failed to interview and solicit testimony from  
3 the physicians who treated him after he absconded to Wisconsin,” petitioner did not alleges that  
4 counsel failed “to inquire as to whether medical treatment had been received” by petitioner, and (3),  
5 while acknowledging that petitioner did contend in the state court that he received ineffective  
6 assistance by counsel for “failing to hire a forensic pathologist to analyze evidence of gunshot  
7 residue, petitioner never complained that counsel was ineffective for “failing to hire a forensic  
8 pathologist or crime scene investigator knowledgeable about testing for gunshot residue.”

9 Having reviewed the opening, responding, and reply briefs presented to the Nevada  
10 Supreme Court on appeal of denial of the post-conviction petition for writ of habeas corpus, the  
11 court finds that the differences between the claims raised and argued before the Nevada Supreme  
12 Court and the claims raised and argued here are in no way substantive and are insufficient to place  
13 the claim of ineffective assistance of counsel at trial in a significantly different light. The facts  
14 presented to this court were all presented for the Nevada Supreme Court’s review. Simple editing or  
15 reorganization of the arguments are of no moment in considerations of exhaustion. The interests of  
16 comity have been served and the petition shall proceed before this court on its merits.

17 Furthermore, the court finds respondents’ motion to dismiss plainly and painfully  
18 disingenuous. The minuscule and inconsequential differences identified between the state post-  
19 conviction appeal and this federal petition do not warrant the expenditure of resources this motion  
20 has required. Respondents are cautioned to consider such arguments carefully in the future.

21 **IT IS THEREFORE ORDERED** that the motion to permit late filing (docket #14)  
22 is **GRANTED**.

23 **IT IS FURTHER ORDERED** that the motion to dismiss (docket #6) is **DENIED**.

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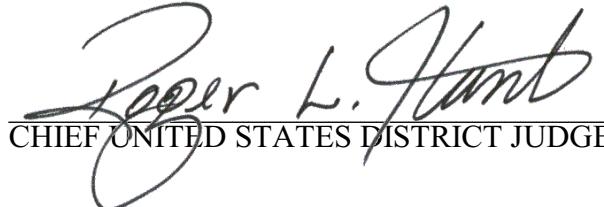
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1                   **IT IS FURTHER ORDERED** that the respondents shall have thirty (30) days to file  
2 their answer to the claims presented in this petition. Thereafter, petitioner shall have thirty (30) days  
3 to reply.

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5                   Dated this 8<sup>th</sup> day of July, 2010.

6                     
7                   CHIEF UNITED STATES DISTRICT JUDGE  
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